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No. 711

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner

vs.

WILSON & CO., INC., SWIFT & COMPANY, AND ARMOUR AND COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX OF RESPONDENTS WILSON & CO., INC., ET AL.

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WILSON & CO., INC.,
SWIFT & COMPANY, AND
ARMOUR AND COMPANY

La Salle Street Press—Chicago 10

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In view of the belated attempt by the Federal Communications Commission to add another issue in this *certiorari* proceeding by resurrecting its Additional Pleading filed with the Court of Appeals *after* the Commission had petitioned that court for rehearing on the order granting an interlocutory injunction, the meatpacker respondents herein

ask leave to file this Appendix incorporating their reply to such Additional Pleading which was the only reply thereto filed below.

Respectfully submitted,

CHARLES A. BANE
ARTHUR C. GEHR
SHARON L. KING
Counsel for Respondents
WILSON & CO., INC.,
SWIFT & COMPANY, AND
ARMOUR AND COMPANY

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

WILSON & CO., INC., SWIFT & COMPANY, AND ARMOUR AND COMPANY, *Petitioners,* vs. FEDERAL COMMUNICATIONS COMMISSION, et al., *Respondents.*	No. 14269 Petition for Review of an Order of the Federal Communications Commission

PETITIONERS' REPLY TO ADDITIONAL PLEADING OF UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION

For the reasons hereinafter stated, petitioners oppose the latest refund proposal filed by the United States and the Federal Communications Commission. Petitioners are convinced that once the Court considers the ramifications and hopeless complexities of the Government's refund proposition, the Court will find it unacceptable. Petitioners submit that injunctive relief is the only feasible and defensible solution to the problem confronting the Court here. Under the circumstances involved in this appeal, the interlocutory injunction provides the simplest mechanics and fairest results for all interested parties, including the large number

of private line users not represented or appearing before this Court.

Petitioners' initial request for an interlocutory injunction limited in scope was made only after thoughtful deliberation of several alternative remedies which would give petitioners the protection required to avoid irreparable damage. A refund alternative comparable to that now proposed by the Government was carefully considered by counsel for petitioners.

As a result of many years experience in representation of utilities in countless rate matters, including several experiences with refunds by utilities to large numbers of customers, counsel for petitioners have found that the administration of refunds is extremely complex and almost automatically results in protracting litigation. Our experience has been that refunds of excess charges to customers can promote an endless tide of customer complaints respecting computation of their respective refunds. We have found also that the expense of distribution of refunds is substantial and results in a very real diminution of the amount ultimately recovered by the customers. In addition, under the peculiar circumstances of this appeal, it may be anticipated that substantial claims for attorneys' fees would be made against the fund available for refund.

Because of these complexities which are inherent in the Government's proposal, counsel for petitioners did not feel justified in asking this appellate court to take on the heavy burdens implicit in the administration of a refund as proposed by the Government. While in appeals of certain rate orders the assumption of such obligations by a trial court may be justified, none of such considerations are present here.

The Government has failed in any of its motions, briefs or other pleadings to cite any precedent for their refund proposal where the rate order provided for both increases and decreases in charges. To the best knowledge of counsel for petitioners there is no such precedent.

The situation now confronting the Court is in no way comparable to the case where a utility appeals from a denial of a requested rate increase and agrees, as the price of charging the higher rates pending appeal, to refund the excess charges if its appeal is unsuccessful.

First, it is obvious that, in the latter case, there is at least some chance that no refund will ever be required. But in this appeal, if the Government's proposal were adopted, refunds would have to be made no matter who is successful. Whatever the outcome, AT&T and Western Union would each be obligated to refund excess charges paid by perhaps half of their customers.

Second, where the utility appeals from a rate order and continues to collect higher charges than are ultimately found reasonable, the expense of distribution of refunds, as well as the expense of the litigation, is a risk assumed by the utility, and not borne by the customers. In the situation of this appeal, however, could the carrier be fairly asked to assume the cost of distribution of a refund for which they were not responsible? Whether or not petitioners are successful in this appeal, it must be anticipated that the refund due and payable to certain customers would be reduced by the costs of such distribution and by the carriers' costs of litigation as well. And, if petitioners are successful in this appeal, the refund would be further reduced by their own costs of litigation.

The Court should be apprized of still another undisclosed and very significant aspect inherent in the Government's proposal. This hidden feature also holds out the promise that the administration of the refund will remain with the Court for years.

In the event that petitioners' appeal is successful and the FCC orders are reversed and set aside, it will become necessary to determine the amount of refund which should be paid to petitioners and all other customers who would have sustained rate increases under the FCC orders. In order to make this computation it would be necessary to determine what were the lawful rates during the appeal period. Some of the parties seem to have wrongfully assumed that the 1958 interim rates would be the legal rates.

But, if anything is certain, it is that *the interim rates cannot be the lawful rates* if the FCC orders are reversed, because the only authority for the interim rates is the FCC's final order itself. *Both the interim rates and the rates finally prescribed are at issue in this appeal.*

Under these circumstances, there are just two alternatives open. One is to treat the pre-interim rates as the lawful rates (see *City of Edwardsville* v. *Illinois Bell Telephone Co.*, 310 Ill. 618, 1924). This could result in a refund to petitioners of roughly ⅓ of the rates prescribed in the FCC order here under review. The other alternative would be to delay the refund until the FCC on remand had established reasonable rates in compliance with the Court's order of reversal, and such finding on remand had been ultimately sustained on review.

Consequently, unless the carriers *consent* to an order which would provide for the refund to petitioners (and others similarly situated) of the entire differential between

the prescribed rates and the pre-interim rates, the distribution of any refund would be hopelessly delayed.[1] In view of the FCC's propensities and its concept that consuming more than 7½ years in the disposition of a rate proceeding constitutes compliance with the statutory mandate that such proceedings be handled "as speedily as possible," (47 USCA, § 204) petitioners despair of any hope that, if the Government's proposal is adopted, these proceedings will ever be terminated without drastic action of this Court or that any refund will be distributed, regardless of the ultimate outcome on the merits.

Petitioners would, for the reasons set forth above, suffer irreparable damage if this Court were to adopt the Government's proposal. For the Government to deny this is to turn away from any thoughtful consideration of the problems inherent in the review by appellate courts of rate orders of administrative agencies.

Petitioners submit that these considerations are impelling reasons for rejection of the Government proposal.

The only other solutions with any semblance of equity and simplicity are (i) an interlocutory injunction limited in scope as initially requested by petitioners, or (ii) an interlocutory injunction of the FCC orders in their entirety as adopted by this Court.

The considerations which led petitioners to limit the scope of the injunction initially requested were merely that it was a method by which they could avoid irreparable damage, which could not cause injury to any customer and would

[1] The unlikelihood of securing any such consent from the carriers perhaps explains the FCC's guarded statements that "T&T and Western Union have 'consented in principle' and that "AT&T has stated that its agreement does not extend to retroactive effect." It may also explain why the FCC failed to furnish a form of order with its additional pleading.

have minimal effects on the carriers. Under the limited interloctory injunction proposal, the Government as a customer would have secured all of the reductions in rates to which the Government now claims it is entitled.

Petitioners' initial request for a limited injunction was objected to by AT&T and Western Union[2] solely on the ground that granting a stay of the FCC orders to these three customers would constitute an extension of the undue discrimination resulting from the stay granted to news agencies by FCC. Petitioners submit that this argument, which is truly superficial, overlooks the simplicity and the absence of any unfair effect of a limited injunction.

For all of the foregoing reasons, petitioners submit that an interlocutory injunction, limited in scope as initially requested by petitioners, affords a simple, fair and reasonable solution in the circumstances of this appeal. Petitioners also submit that any reconsideration by the Court of its September 27, 1963 order granting the injunction of the FCC orders in their entirety should include consideration of this avenue of approach.

Nevertheless, petitioners were ready, and will continue, to accept and support the alternative proposal, suggested initially by AT&T and adopted by the Court, of enjoining the FCC orders in their entirety. In petitioners' view this approach is not only proper, it is the most equitable for the greatest number of customers and other interested parties.

The interloctory injunction of the FCC orders in their entirety seems the fairest solution because

[2] This proposal would have had almost no effect on Western Union since only one of the forty-two private lines leased by petitioners is provided by Western Union.

(a) it provides a means for the carriers to balance the countereffects of the prescribed increases and decreases in charges;

(b) it maintains the *status quo* pending appeal which is a normal procedure in contested litigation involving irreparable damage to some interested parties;

(c) it provides protection for the large number of customers who would be adversely affected by increases in charges (the receipt by petitioners and their counsel of numerous inquiries and expressions of support from such affected customers not before this Court substantiates this consideration); and

(d) it cannot prejudice telegraph grade customers who, in the absence of the injunction, would benefit from reduced charges under the rates prescribed by the FCC orders. The absence of any prejudice arises from the terms under which the interim telegraph rates were placed into effect (and would continue in effect under the injunction) which would permit such customers to obtain refunds of the excess charges paid if petitioners' appeal were unsuccessful.

One of the grounds urged by the Government to justify its refund proposal is that "since petitioners have already requested a sixty-day extension of time to file their brief, it appears that the case may take some time to resolve". The allegation is completely without substance. It ignores the fact that petitioners have offered to withdraw their motion for extension of time and to file their brief and appendix within 30 days after the FCC files the required supplemental record.[1] The request for such supplemental record was filed more than two weeks ago. The omitted items required were precisely identified. The FCC has conceded such items were omitted, because they were "overlooked", and agreed to supply at least some of them "as soon as practicable".

Ignoring these facts, and petitioners' Emergency Motion as well, the FCC has failed to file a single item as of this date.

Under these circumstances, the FCC alone must bear the burden of delay. If it would promptly perform its responsibilities as a party to this appeal, and if the FCC and other parties file their briefs in the time allowed by the Court's Rules, this appeal can be heard on the merits within two or three months. If the FCC will only stop its quarreling on the fringes and permit the case to be considered on its merits, the Court can dispose of the problem in January, 1964.

Accordingly, petitioners urge the Court to reject the Government's additional pleading, reaffirm its prior order issuing the interlocutory injunction and direct the FCC to file the supplemental record forthwith.

Respectfully submitted,

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February 12, 1964